JAYA SUDHIR JAYARAM v. NAUTICAL SUPREME SDN BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
HASNAH MOHAMMED HASHIM JCA
RHODZARIAH BUJANG JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-268-02-2018]
9 AUGUST 2018

CIVIL PROCEDURE: *Trial – Procedure – Consolidation of suits – Refusal of – Appeal against High Court's refusal to consolidate two suits – Whether there was clear commonality of issues and facts – Whether principle for consolidation as provided in O. 4 of Rules of Court 2012 satisfied – Whether counterclaim ought to be filed instead – Whether failure to file counterclaim rendered insignificant – Rules of Court 2012, O. 15 – Whether just to both parties to allow respective claims to go before two different judges whose decisions may conflict*

The appellant was aggrieved by the refusal of the High Court to consolidate two suits in which he was directly involved – as a defendant in Suit 544 and as a plaintiff in Suit 165. The legal disputes concerned a joint venture company, Nautilus Tug & Towage Sdn Bhd ('the joint venture company') which at the time of its incorporation was for the purpose of undertaking a continuation of a project by another entity. The joint venture company was owned by Azimuth Marine Sdn Bhd ('Azimuth') and Nautical Supreme Sdn Bhd ('Nautical') with Azimuth holding 80% shares and Nautical, the remaining 20%. On 16 December 2015, Azimuth transferred 10% of its shares in the joint venture company to the appellant and the following year, the appellant was appointed a director of the joint venture company. Nautical alleged that the said transfer by Azimuth was in breach of the shareholders' agreement and sued the appellant in Suit 544, contending, *inter alia* that he had wrongfully procured the shares and/or had induced Azimuth to breach the said agreement. The appellant subsequently filed Suit 165, contending that there was a collateral understanding between him, Nautical and Azimuth that he was the beneficial owner of 80% of the joint venture company's shares held in Azimuth's name, that he would be entitled to participate in the equity of the joint venture company, with Nautical's consent, and therefore no further consent was necessary to divest part of Azimuth's 80% shares in the joint venture company to him. The High Court Judge refused the application for consolidation on what appeared to be on the primary ground that the appellant should have filed a counterclaim in Suit 544 instead, since the suit was filed eight and a half months earlier than his own suit. His Lordship also considered that the filing of Suit 165 was an attempt to improve the pleadings in Suit 544 when the appellant failed to file his counterclaim or initiate third party proceedings against the others whom he sued as co-defendants in this action/appeal. Hence, this appeal by the appellant against the High Court decision.

Held (allowing appeal with costs)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) Given the clear commonality of the issues and facts in the two suits, the main purpose of consolidation as stated by the Federal Court in the case of *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* (*'Central Securities'*) and raised by the appellant had clearly been achieved. It was held in the said case that the main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is some 'common question of law or fact bearing sufficient importance in proportion to the rest.' The failure to file the counterclaim, given the clear satisfaction of the principle for consolidation as provided in O. 4 of the Rules of Court 2012 ('ROC') as well as the extremely important consideration of whether there would be inconsistent judgments pronounced by two courts, was clearly overshadowed by these legal considerations. That failure was rendered even more insignificant by the use of the word 'may' in O. 15 of the ROC which governs the filing of a counterclaim. Thus, a defendant could not be forced to bring a counterclaim when sued, for the law gives him an election. (paras 8-10)

(2) Both cases were filed at the High Court of Kuala Lumpur but in different divisions, which could not stand in the way of the all important consideration as stated in *Central Securities* for these different divisions were created to streamline the courts for a more expeditious and efficient disposal of cases and not to create an obstacle or a hindrance against genuinely deserving cases filed in different divisions. It would be unjust to both parties to allow their respective claims to go before two different judges whose decisions may conflict with each other, and this probable outcome must be avoided at all costs. (paras 11 & 13)

Bahasa Malaysia *Headnotes*

Perayu terkilan dengan keengganan Mahkamah Tinggi menggabungkan dua guaman yang perayu terlibat iaitu sebagai defendan dalam Guaman 544 dan sebagai plaintif dalam Guaman 165. Pertikaian undang-undang berkenaan syarikat usaha sama, Nautilis Tug & Towage Sdn Bhd ('syarikat usaha sama') yang semasa pemerbadanannya adalah untuk tujuan menanggung kesinambungan satu projek oleh entiti lain. Syarikat usaha sama dimiliki Azimuth Marine Sdn Bhd ('Azimuth') dan Nautical Supreme Sdn Bhd ('Nautical') dengan Azimuth memegang 80% saham dan Nautical, baki 20%. Pada 16 Disember 2015, Azimuth memindah milik 10% sahamnya dalam syarikat usahasama dan satu tahun selepas itu, perayu dilantik sebagai pengarah syarikat usahasama. Nautical mendakwa pindah milik oleh Azimuth melanggar perjanjian pemegang-pemegang saham dan menyaman perayu dalam Guaman 544, dengan hujahan, antara lain, bahawa dia, dengan salah, memperoleh saham dan/atau mendorong Azimuth melanggar perjanjian tersebut. Perayu kemudiannya memfailkan Guaman 165 dengan hujahan terdapat pemahaman kolateral antaranya, Nautical dan Azimuth

bahawa dia adalah pemilik benefisial 80% syarikat usahasama yang dipegang dalam nama Azimuth, bahawa dia berhak menyertai ekuiti syarikat usaha sama dengan kebenaran Nautical dan dengan itu tiada persetujuan lanjut diperlukan untuk melucutkan sebahagian saham Azimuth dalam syarikat usaha sama kepadanya. Hakim Mahkamah Tinggi menolak permohonan penggabungan atas alasan bahawa perayu harus memfailkan tuntutan balas dalam Guaman 544, kerana guaman difailkan lapan setengah bulan lagi awal dari guamannya sendiri. Hakim Mahkamah Tinggi juga mengambil kira bahawa pemfailan Guaman 165 adalah percubaan memperbaiki pliding dalam Guaman 544 apabila perayu gagal memfailkan tuntutan balas atau memulakan prosiding pihak ketiga terhadap yang lain apabila dia menyaman defendan-defendan dalam tindakan/rayuan ini. Oleh itu, rayuan ini terhadap keputusan Mahkamah Tinggi.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Memandangkan terdapat persamaan jelas isu-isu dan fakta-fakta dalam dua guaman itu, tujuan utama penggabungan, seperti dinyatakan oleh Mahkamah Persekutuan dalam kes *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* ('*Central Securities*') dan dibangkitkan oleh perayu telah tercapai. Diputuskan dalam kes tersebut bahawa tujuan utama penggabungan adalah untuk menjimatkan kos dan masa, dan dengan itu tidak akan diperintahkan kecuali jika terdapat 'persoalan undang-undang dan fakta yang sama yang membawa kepentingan mencukupi berkadaran dengan yang lain.' Kegagalan memfailkan tuntutan balas, berdasarkan prinsip penggabungan yang diperuntukkan dalam A. 4 Kaedah-Kaedah Mahkamah 2012 ('KKM') jelas dipatuhi serta pertimbangan penting sama ada mungkin wujudnya penghakiman yang tidak konsisten disebut oleh dua mahkamah, jelas remeh apabila mengambil kira pertimbangan undang-undang ini. Kegagalan itu tidak lagi menjadi penting dengan penggunaan perkataan 'boleh' yang mentadbirkan pemfailan satu tuntutan balas. Oleh itu, defendan tidak boleh dipaksa membuat tuntutan balas apabila disaman kerana undang-undang memberinya pilihan.

(2) Kedua-dua kes difailkan di Mahkamah Tinggi Kuala Lumpur tetapi dalam bahagian lain, dan ini tidak boleh menghalang pertimbangan penting seperti yang dinyatakan dalam *Central Securities* kerana bahagian-bahagian berlainan diwujudkan untuk menyelaraskan cara pelupusan kes-kes mahkamah dengan lebih cepat dan cekap dan bukan untuk mewujudkan halangan terhadap kes-kes yang benar berhak difailkan dalam bahagian-bahagian lain. Tidak adil buat kedua-dua pihak untuk membenarkan tuntutan masing-masing dikemukakan kepada dua hakim berlainan yang keputusannya mungkin berkonflik antara satu sama lain, dan keputusan yang berkemungkinan ini harus dielakkan walau apa-apa pun.

Case(s) referred to:

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1978] 1 LNS 20 FC ***(refd)***

Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (Malaysia) Bhd [2002] 1 CLJ 645 FC ***(refd)***

Ng Joo Soon v. Devechem Holdings (M) Sdn Bhd And Ors [2010] 1 LNS 1677 HC ***(dist)***

RHB Bank Bhd v. SSB Consortium Berhad & Ors [2009] 5 CLJ 76 HC ***(dist)***

Selinsing Mining Sdn Bhd v. Selinsing Gold Mine Manager Sdn Bhd & Ors [2017] 2 CLJ 610 HC ***(dist)***

Sykt Multi Wood v. Foosan Timber Industries Sdn Bhd & Anor [1992] 4 CLJ 1915; [1992] 3 CLJ (Rep) 623 HC ***(refd)***

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No 3) [1998] 5 CLJ 794 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 4 r. 1, O. 15 r. 2(1), O. 57 r. 1(1)

For the appellant - Gopal Sri Ram, Robert Low, Karen Yong & David Yii; M/s Ranjit Ooi & Robert Low

For the respondent - Su Tiang Joo, KL Pang, Teh Eng Lay, ZT Chok & Nicholas Teh; M/s Cheah Teh & Su

[Editor's note: For the High Court judgment, please see Nautical Supreme Sdn Bhd v. Jaya Sudhir Jayaram [2018] 1 LNS 156 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JCA:

Brief Facts Of The Case

[1] The appellant ('Jaya Sudhir') was aggrieved by the refusal of the High Court to consolidate two suits in which he was directly involved – as a defendant in Suit No WA-22NCVC-544-08-2016 ('Suit 544') and as a plaintiff in Suit No WA-22NCC-165-05-2017 ('Suit 165'). The legal disputes concerned a joint venture company, Nautilus Tug & Towage Sdn Bhd ('the joint venture company') which at the time of its incorporation was for the purpose of undertaking a continuation of a project by another entity, Vale. The joint venture company was owned by Azimuth Marine Sdn Bhd ('Azimuth') and Nautical Supreme Sdn Bhd ('Nautical') with Azimuth holding 80% shares and Nautical, the remaining 20%. This shareholding was provided for in a shareholders agreement dated 15 March 2013. Then on 16 December 2015, Azimuth transferred 10% of its shares in the joint venture company to Jaya Sudhir and the following year, Jaya Sudhir was appointed a director of the joint venture company. Nautical alleged that the said transfer by Azimuth was in breach of the shareholders agreement and sued Jaya Sudhir in Suit 544, contending, *inter alia*, that he had wrongfully procured the shares and/or had induced Azimuth to breach the said

agreement. Jaya Sudhir subsequently filed Suit 165 contending that there was a collateral understanding between him, Nautical and Azimuth that he was the beneficial owner of 80% of the joint venture company's shares held in Azimuth's name, that he would be entitled to participate in the equity of the joint venture company with Nautical's consent and therefore no further consent was necessary to divest part of the Azimuth's 80% shares in the joint venture company to him. Why this consent was raised was because cl. 9.1 of the shareholders agreement restricts the transfer of shares in the joint venture company in the manner prescribed therein and consent is a pre-condition to such a transfer. The relevant provision of cl. 9.1, ie, sub-cls. (a) and (c) are reproduced below:

Clause 9.1

(a) No Shareholder shall transfer shares held by it in the capital of the Company or otherwise sell, dispose or deal with all or any part of its interest in such shares otherwise than in accordance with the provisions of the Company's Articles of Association until and unless the rights of pre-emption conferred by this Clause have been exhausted.

(b) …

(c) Every shareholder who desires to transfer any share or shares in the Company (for the purpose of this Clause 9.1 only, referred to as the Transferor') shall give to the Company a notice in writing of such desire ('Transfer Notice') Subject as hereinafter mentioned, a Transfer Notice shall constitute the Company as the Transferor's agent for the sale of the share of shares specified therein (the 'said shares'). Upon the Company's receipt of the Transfer Notice, the Directors shall offer the said Shares for sale, in one or more lots, at the discretion of the Directors, to the Shareholders other than the Transferor at the Prescribed Price.

[2] No such consent was obtained, said Nautical when Azimuth effected the transfer of its shares in the joint venture company to Jaya Sudhir. Jaya Sudhir on the other hand contended that one Dato' Seri Timor Shah Rafiq, a director of both Nautical and the joint venture company, had facilitated a breach of that collateral understanding and for which the said personality was sued by him as the first defendant in Suit 165, Nautical as the second defendant, Azimuth as the third defendant and the joint venture company as the fourth and final defendant.

[3] It has to be mentioned also that Nautical did serve a notice of arbitration to Azimuth and the joint venture company for breach of the shareholders agreement pursuant to cl. 33 of the said agreement and that in Suit 165, Jaya Sudhir had also filed for an injunction to restrain the arbitration. This was allowed by Mohammed Zaini Mazlan J on 6 November 2017. A stay application filed by Dato' Seri Timor Shah Rafiq

and Nautical against that decision was dismissed by the same judge. A consolidation application, the subject matter of this appeal, was filed by Jaya Sudhir soon after that dismissal and was heard before another High Court Judge, Nordin Hassan J.

[4] The learned High Court Judge refused the application for consolidation on what appears to be on the primary ground that Jaya Sudhir should have filed a counterclaim in Suit 544 instead, since the suit was filed eight and a half months earlier than his own suit. This to us amounts to an indirect finding by the learned High Court Judge that there was in fact a commonality of facts and issues in these two actions. However, His Lordship considered that the filing of Suit 165 was an attempt to improve the pleadings in Suit 544 when Jaya Sudhir failed to file his counterclaim or initiate third party proceedings against the others whom he sued as co-defendants in this action/appeal. Further, said His Lordship, these two suits are in the nature of cross-actions and by the authority of *Sykt Multi Wood v. Foosan Timber Industries Sdn Bhd & Anor* [1992] 4 CLJ 1915; [1992] 3 CLJ (Rep) 623 cross-actions cannot be consolidated, as held by Chong Siew Fai J (as His Lordship then was). His Lordship also alluded to the general practice of consolidating a later suit with the earlier one and not *vice versa* as in this case to avoid the perception of 'judge choosing', as described by RK Nathan J in *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No 3)* [1998] 5 CLJ 794 at p. 796.

Consolidation

[5] Consolidation of actions is governed by O. 4 r. 1 of the Rules of Court 2012. The said provision reads:

> Where two or more **causes or matters are pending**, and if it appears to the Court that:
>
> (a) some common question of law or fact arises in both or all of them;
>
> (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) for some other reason it is desirable to make an order under this rule, the court may order the **causes or matters to be consolidated** on such terms as it thinks just or may order the **causes or matters to be tried at the same time or one immediately after another** or may order any of the causes or matters to be stayed until after the determination of any other of the causes or matters. (emphasis added.)

[6] Other than the summary of the commonality of the two causes of actions as alluded to briefly above, Jaya Sudhir's counsel have in Annexure A to their written submission tabulated in greater details the common facts and issues in the two suits. This was really helpful in resolving this appeal

in Jaya Sudhir's favour but which we desisted from reproducing in this judgement given the clear commonality of the facts and issues mentioned earlier even from the brief summary of their respective causes of action.

[7] However, learned counsel for Nautical argued that this O. 4 is only applicable when the 'two or more causes or matters are pending' before the same High Court as this would be consistent with 'the due administration of justice while maintaining judicial harmony and avoiding chaos in litigation'. This approach, argued learned counsel further would be consistent with Practice Direction No 1 of 2008 on the assignment and distribution of cases amongst the different divisions of the Kuala Lumpur High Court. For the record, Suit 165 was filed in the commercial division whereas Suit 544 was filed in the civil division. His other argument against the consolidation was that O. 4 does not permit the transfer of cases as O. 57 is the specific provision for it and fully supported the learned High Court Judge's finding that the two actions being cross-claims could not be consolidated. He further contended that Jaya Sudhir's application was an abuse of the court process for circumventing the rules of pleading because he failed to file a counterclaim in Suit 544.

[8] We do not for a moment disagree that Suit 165 could have been filed as a counterclaim in Suit 544 and the fault for not doing so lies squarely on Jaya Sudhir's shoulders. Nonetheless, given the clear commonality of the issues and facts in two suits, the main purpose of consolidation as stated by the Federal Court in *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* [1978] 1 LNS 20; [1979] 2 MLJ 244 and raised by Jaya Sudhir's counsel before us has clearly been achieved. The Federal Court held at p. 251 paras D-G as follows:

> the main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject-matter of the actions 'to render it desirable that the whole should be disposed of at the same time' …
>
> Now, the causes of action in this third party proceeding and Civil Suit No. 2323 of 1976, where the plaintiffs and the defendants are the same, arise out of the same series of transactions, ie, purchase of United Holdings shares and short delivery of such shares, and in our view there are questions of fact or law common to them, eg, where rescission is a common element of relief, it is only necessary to prove that there is misrepresentation, innocent or fraudulent.
>
> We may add that in such circumstances, **one of the tests in deciding whether consolidation should be ordered is to determine whether two inconsistent judgements will come into existence if it is not ordered**. (emphasis added.)

[9] The failure to file the counterclaim, given the clear satisfaction of the principle for consolidation as provided in O. 4 as well as the extremely important consideration of whether there would be inconsistent judgments pronounced by two courts as stated by the Federal Court above, was clearly over-shadowed by these legal considerations.

[10] That failure is rendered even more insignificant by the use of the word 'may' in O. 15 of the Rules of Court 2012 which governs the filing of a counterclaim. The said O. 15 r. 2(1) reads:

> Order 15 rule 2
>
> 2(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and **where he does so he shall add the counterclaim to his defence**. (emphasis added.)

Thus, a defendant cannot be forced to bring a counterclaim when sued for the law gives him an election.

[11] As for the argument that only cases before the same High Court can be transferred, with respect we were unable to accede to the same. Order 57 of the Rules of Court 2012 on transfer of proceedings does not come into play in the factual matrix of this case although it cannot be denied that the natural consequence of the consolidation order when allowed would result in one case being transferred to the other court and heard by the same judge. Order 57 r. 1(1) caters specifically for cases where, for instance, a case in the Kuala Lumpur High Court would be more expediently heard in the High Court in Shah Alam. In this appeal, both cases were filed in the High Court of Kuala Lumpur but in different divisions, cannot stand in the way of the all important consideration as stated in Central Securities for these different divisions were created to streamline the courts for a more expeditious and efficient disposal of cases but not to create an obstacle or a hindrance against genuinely deserving cases filed in different divisions. In saying this, we were aware that Dato' Seri Timor Shah Rafiq and Nautical did apply to transfer Suit 165 to the Civil Division but this was dismissed by Mohammed Zaini Mazlan J on 20 March 2018 after Nordin Hassan J's refusal to consolidate the two cases. The importance of Practice Directions as held by the Federal Court and submitted by Jaya Sudhir's counsels in *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (Malaysia) Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385 are purely administrative in nature and cannot in itself override statutory rules of procedure for the court.

[12] Before concluding, we must in fairness to Nautical's counsel, mention that they have cited cases in support of their argument against the consolidation, but these we must state are High Court decisions which are

not binding on us. Furthermore, the cited cases have rightly been distinguished in the oral submission of learned counsel for Jaya Sudhir before us as follows:

(i) *RHB Bank Bhd v. SSB Consortium Berhad & Ors* [2009] 5 CLJ 76:

In this case Hishamuddin J set aside an order for leave pursuant to the Bankruptcy Act 1967 which he had made earlier on the basis that when His Lordship made the order, he was not sitting in a bankruptcy court, hence His Lordship had no jurisdiction over the bankruptcy file;

(ii) *Ng Joo Soon @ Nga Ju Soon v. Devechem Holdings (M) Sdn Bhd And Ors* [2010] 1 LNS 1677:

The facts as reported shows that only parties in the two proceedings were the same but not the background facts; and

(iii) *Selinsing Mining Sdn Bhd v. Selinsing Gold Mine Manager Sdn Bhd & Ors* [2017] 2 CLJ 610; [2017] 10 MLJ 97:

In this case, the second and third defendants applied to transfer and consolidate a case in the Shah Alam High Court with that filed by the second and third defendants in Kuantan High Court and for an order that the Shah Alam Suit be heard after the Kuantan Suit.

[13] In conclusion, we have to reiterate that it would be unjust to both parties to allow their respective claims to go before two different judges whose decisions may conflict with each other, and this probable outcome must be avoided at all cost.

[14] For all the reasons stated above, we allowed the appeal with cost of RM10,000 here and below.